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Supreme Court, U.S.
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No. 86-

In The

Supreme Court of the United States

October Term 1986

RICHARD REYNOLDS

Petitioner

versus

INGALLS SHIPBUILDING DIVISION,
LITTON SYSTEMS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the jurisdiction of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq., extends to injuries upon the high seas even though the Act limits coverage to "the navigable waters of the United States" and specifically defines "United States" as "the several States and Territories and the District of Columbia, including the territorial waters thereof."

2. Whether, assuming the Longshore and Harbor Workers' Compensation Act does apply, an individual employed as a cook on a vessel maneuvering in the high seas during sea trials and the captain of said vessel are persons engaged in ship-building services to the vessel, thus precluding an action for negligence under 33 U.S.C. Section 905(b).

LIST OF PARTIES

1. Richard Reynolds, plaintiff/ appellant-petitioner
2. Paul S. Minor, Counsel for plaintiff/appellant
3. Judy M. Guice, Counsel for plaintiff/appellant
4. Ingalls Shipbuilding Division, Litton Systems, Inc., defendant/appellee-respondent
5. Karl Wiesenburg, Counsel for defendant/appellee

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IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD REYNOLDS

Plaintiff/Appellant-
Petitioner

versus

INGALLS SHIPBUILDING DIVISION,
LITTON SYSTEMS, INC.

Defendant/Appellee-
Respondent

REFERENCES TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

Plaintiff, Richard Reynolds, seeks review of the decision of the United States Court of Appeals for the Fifth Circuit. See, Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc., 788 F.2d 264 (5th Cir. 1986). The Opinion of the Fifth Circuit is reproduced in the Appendix.

STATEMENT OR GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

On April 25, 1986, the Fifth Circuit Court of Appeals rendered its opinion affirming the dismissal of Plaintiff's action. A timely Petition for Rehearing was filed on May 9, 1986, which was denied on May 27, 1986.

This case falls within the discretionary jurisdiction of this Honorable Court pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED IN THIS CASE

At issue is the construction of various provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. Specifically, 33 U.S.C. Section 903(a), the coverage section of the Act, provides in part as follows:

> [C]ompensation shall be payable . . . if a disability or death results from an injury occurring upon the navigable waters of the United States . . . .

The term "United States" is defined at 33 U.S.C. Section 902(9) as "the several States and Territories and the District of Columbia, including the territorial waters thereof." Section 905(b), effective at the time of Mr. Reynolds' injury, provided as follows:[1]

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this Title . . . . If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel . . . . The

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[1] Mr. Reynolds' injuries occurred in May, 1982, prior to the 1984 Amendments to the Act.

> remedy provided in this subsection shall be exclusive of all other remedies against the vessel except for remedies available under this chapter.

The term "vessel" is defined in 33 U.S.C. Section 902(21) as follows:

> The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer or bare boat charterer, master, officer, or crew member.

STATEMENT OF THE CASE

On or about May 6, 1982, Plaintiff, Richard Reynolds, normally employed as a shipfitter with Defendant, Ingalls Shipyard, in Pascagoula, Mississippi, was on temporary assignment with the stewards department for builder's sea trials on the USS TICONDEROGA. On said date, while the vessel was navigating upon the high seas, Plaintiff suffered permanent injuries to his left knee when the vessel

began to exercise high speed turns, causing it to list significantly from side to side. Reynolds was given no instructions concerning the actions he should take during high speed turns in order to protect himself.

The builder's sea trials were required to be conducted by Ingalls pursuant to its contract with the United States. Contract provisions governing sea trials provided in part as follows: (1) the government was prohibited from exercising control over the navigational operation of the ship; (2) Ingalls was required to provide a competent crew including licensed master and pilot; (3) Ingalls was required to operate the vessel in navigable waters, although the exact location of trials was at its discretion.

The present action was filed on August 24, 1983, against Ingalls Shipbuilding, Litton Systems, Inc., with allegations of four separate and distinct causes of action: (1) negligence of Defendant under the Jones Act, 46 U.S.C. Section 688; (2) negligence of Defendant under 33 U.S.C. Section 905(b), Longshore and Harbor Workers' Compensation Act; (3) unseaworthiness; and (4) negligence under general maritime law. Federal court jurisdiction was conferred pursuant to 28 U.S.C. Section 1332 and 28 U.S.C. Section 1333.

Ingalls admitted in its Request for Admission and in the Pretrial Order that it was the operator of the USS TICONDEROGA and controlled the activities aboard it on the day of Plaintiff's injury.

On October 3, 1984, the lower court entered its ruling granting Defendant's Motion for Partial Summary Judgment and dismissed Plaintiff's causes of action for Jones Act negligence, unseaworthiness, and general maritime law, reasoning that the LHWCA provided Plaintiff his exclusive remedy. This action was taken despite evidence indicating that the injury occurred outside the state territorial waters.

Subsequently, on October 16, 1984, after a jury had been selected and on the eve of trial, the lower court ordered Defendant to file a Motion for Summary Judgment on the 905(b) claim. The district court granted Defendant's Motion for Summary Judgment on January 18, 1985, based on its conclusion that Ingalls was not the "operator" of the vessel and hence was not subject to suit. Plaintiff

timely appealed the district court's decision to the Fifth Circuit Court of Appeals. The threshold question for the Fifth Circuit's decision was whether the Longshore Act applies to injuries occurring upon the high seas. If it did, then Plaintiff's sole and exclusive remedy would be under Section 905(b) of that Act. If, however, the Act does not apply to injuries beyond state territorial waters, then Plaintiff would be free to pursue a claim under the general maritime law.

On April 25, 1986, the Fifth Circuit rendered its opinion holding that the Longshore Act has application to injuries occurring beyond the state territorial waters and, in addition, affirming the district court's conclusion that Ingalls was not, in fact, the "operator" of the vessel as required by Section 902(21).

The Fifth Circuit failed to mention that Ingalls had admitted its operator status in the pleadings below. A timely filed Petition for Rehearing En Banc was denied on May 27, 1986.

ARGUMENT

1. Whether the LHWCA applies to injuries occurring upon the high seas.

The issue here presented is: Does the LHWCA apply to injuries upon the "high seas" or is it limited to state territorial waters? The Act expressly limits coverage to injury occurring "upon the navigable waters of the United States." 33 U.S.C. Section 903(a). "United States" is defined in the Act as meaning "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. Section 902(9). The only mention of the high seas in the Act

is in its administration section which, in referring to compensation districts, states they will "include the high seas." 33 U.S.C. Section 939.

Learned treatise writers have concluded that the high seas are beyond the reach of the LHWCA.

> Navigable waters and the high seas had two distinct meanings at the time the Longshoremen's and Harbor Workers' Compensation Act was passed. Under admiralty law there were two distinct bodies of water, i.e., the high seas and navigable waters.
>
> . . .
>
> The three mile limit is significant in determining where navigable waters end and the high seas begin. Under the Submerged Lands Act "lands beneath navigable waters" means lands extending three geographical miles distant from the coastline of each state. No case under the Longshoremen's and Harbor Workers' Compensation Act has been found where the court had to draw a sharp line between the point where "navigable waters" ended and "high seas" began. If the Court had to make such determination in a Longshoremen's and Harbor Workers' Compensation Act case it would

> probably draw the line at a point three geographical miles distant from the coastline.

Millus & Manes, Longshoremen's & Harbor Workers' Compensation Act and its Extensions, 77-80 (1978). See also, 4 Larson's Workmen's Compensation Law, 16-189.

As noted by the Fifth Circuit, the case sub judice is the third reported Federal Court opinion discussing the applicability of the LHWCA to the high seas.

The issue first arose in Williams v. Avondale Shipyards, Inc., 452 F.2d 955 (5th Cir. 1971), a case factually identical to Reynolds' claim, inasmuch as it involved injuries while a vessel was on sea trials. In Williams, the lower court dismissed Plaintiffs' claims for Jones Act negligence, unseaworthiness, and general maritime law negligence. On

appeal, the Fifth Circuit affirmed dismissal of the Jones Act and unseaworthiness claims but reversed and remanded on the general maritime law claim, stating that dismissal of that claim, based on the exclusivity of the LHWCA, was improper until it could be determined whether the location of the injury removed the case from the Act's jurisdiction. In so holding, the court noted that "there is neither legislation nor case law to indicate with assurance that the Longshoremen's Act applies on the high seas." 452 F.2d at 960.

The issue arose again in Cove Tankers v. United Ship Repair, Inc., 683 F.2d 38 (2d Cir. 1982), in which a vessel owner sued an injured party's employer for indemnification. Since such an action is prohibited under the LHWCA, the court was faced with a determination of

whether the Act applied to the injury, which occurred on the high seas. In holding the indemnity action barred and the Act applicable, the court limited its decision to the peculiar facts of the case: (1) action brought by ship owner against employer for indemnification, and not by injured employee; (2) vessel beyond state territorial waters only because of an unscheduled deviation from its course; (3) injured employee performing traditional ship repair functions. 683 F.2d at 39-41.

In the case sub judice, the Fifth Circuit held the Act applied to injuries on the high seas, reasoning as follows:

> To hold in this case that the three-mile line constitutes the outer boundary of the LHWCA would be to introduce hard lines and to create a statute which builders testing their ships could easily and purposefully sail beyond.

15-A.

The legislative history of the Act reveals that early drafts of the "coverage section contained in Section 903(a) would have made the Act applicable to "an injury occurring upon the navigable waters of the United States . . . or occurring while such employee was employed on board a vessel of the United States upon the high seas." See, Cove Tankers Corp. v. United Ship Repair, Inc., 528 F.Supp. 101, 110 (S.D.N.Y. 1981) (discussing legislative history) aff'd on other grounds, 683 F.2d 38 (2d Cir. 1982). The latter language was subsequently deleted, with the coverage section being adopted in its present form. In addition, as this Honorable Court has observed, Congressional attempts to include seamen in the LHWCA scheme have been defeated because the result would be a limitation of recovery

by individuals who are better off without the Act's coverage. Herb's Welding, Inc. v. Gray, ____ U.S. ____, 105 S.Ct. 1421, 1426 n.5 (1984).

The question of whether the Act is limited to injuries occurring within state territorial waters should be resolved by the Court as it involves a matter of extreme jurisdictional importance concerning which uniformity is necessary. In addition, the Fifth Circuit, in allowing a purported public policy in favor of continued coverage to displace Congressional mandate violated previous holdings of this Court that "Congress did not seek to cover [by the LHWCA] all those who breathe the salt air" and "there will always be a boundary to coverage, and there will always be people who cross it during their

employment." Herb's Welding, supra, 105 S.Ct. at 1427 & 1429.

2. Whether, if applicable, Plaintiff has a viable cause of action under Section 905(b).

Having concluded that public policy required applicability of the LHWCA, the Fifth Circuit then determined that Plaintiff did not have a cause of action under Section 905(b) because Defendant was not an "operator" of the vessel within the meaning of 33 U.S.C. Section 902(21) and, in addition, Plaintiff and Ingalls were involved in shipbuilding thus precluding this action. These conclusions were made in spite of admissions by Defendant that it was, in fact, the "operator" of the vessel and despite proof that, at the time of the incident, Plaintiff was working in the vessel's galley and the negligent party

was the captain of the vessel, neither of which can be considered as shipbuilding activities.

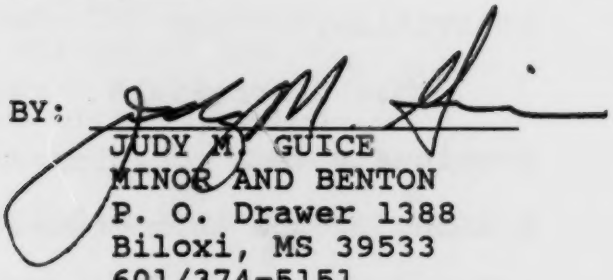
This Honorable Court has not previously had occasion to consider the meaning of the term "operator" as used in Section 902(21). This is a matter of extreme public importance, and a decision by this Court would be of great benefit to the admiralty bar which has been wrestling with the meaning of "operator" for many years. A review of this question would be especially appropriate in this case if, in fact, the Court concludes that the LHWCA applies to injuries on the high seas.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Honorable Court to grant its Petition for Certiorari on both questions presented.

Respectfully submitted,

RICHARD REYNOLDS,
Petitioner

BY: 

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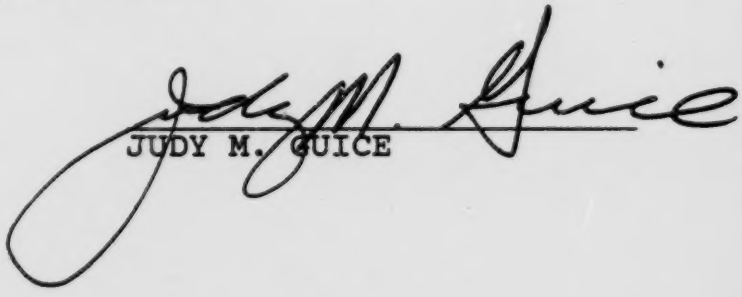
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed to Karl Wiesenburg, Esq., counsel for Respondent Ingalls Shipbuilding Division, Litton Systems, Inc., at Post Office Box 1428, Pascagoula, Mississippi, 39567, by depositing it in the United States Mail, postage prepaid and properly addressed.

Biloxi, Mississippi, this the 15th day of August, 1986.



JUDY M. GUICE

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD A. REYNOLDS,
Plaintiff-Appellant,

v.

INGALLS SHIPBUILDING DIVISION,
LITTON SYSTEMS, INC.,
Defendant-Appellee.

No. 85-4193

OPINION

Filed April 25, 1986

Before: Irving L. Goldberg, Carolyn Dineen Randall and Sam D. Johnson, Circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Southern District of Mississippi
W. Eugene Davis, District Judge, Presiding

SUMMARY

Admiralty

Appeal from summary judgment for the defendant. Affirmed.

Reynolds was a shipfitter for Litton Systems, Inc. Reynolds volunteered to sail on a ship Litton had built and on which it was conducting sea trials. Reynolds was injured during the trials. He sued Litton alleging negligence under the Jones Act; negligence under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA); unseaworthiness of the ship; and general maritime negligence.

[1] Summary judgment for Litton on the matter of Reynolds' Jones Act seaman status was appropriate because the facts relevant

to the determination of seaman status are undisputed and compel the conclusion that Reynolds was not a seaman. [2] Since the ship Reynolds was on was not a "vessel in navigation" there can be no Jones Act coverage. [3] The vessel was not yet an instrumentality of commerce, and so was not "in navigation."

[4] Neither party disputes that the LHWCA applies to shipfitters such as Reynolds. To hold it ceased to apply merely because Reynolds was injured while the ship was more than three miles offshore would be to impart an exceedingly parochial meaning to a statute which is to be construed liberally to protect injured maritime workers. [5] "Navigable waters" as used in the LHWCA may include the high seas. [6] The "high seas," as the term is currently understood, do begin at a line three miles offshore, but it has never been understood that the navigable waters of the United States end there. [7] Furthermore, the "Administrative" section of the LHWCA uses the term "high seas," [8] and § 903 would be redundant if "high seas" were not included in "navigable waters." [9] Although the legislative history does not expressly define "navigable waters of the United States," the legislative hearings pertaining to the Act refer periodically to "navigable waters" without suggesting that the phrase is confined to territorial waters. [10] Had Congress intended to define navigable waters narrowly for purposes of the LHWCA, it could have chosen the term territorial waters, or it could have explicitly indicated that navigable waters of the United States exclude the high seas. [11] To decline to apply the LHWCA to injuries occurring more than three miles offshore would be inconsistent with congressional intent to reduce the importance of situs as applied to employees who might otherwise be covered for only a part of their work. [12] Congress' general intent in enacting the 1972 amendments to the LHWCA was to broaden the Act's coverage, to insure that workers not cease to be covered by a mere fortuity of crossing a line. [13] The failure of the Act to state explicitly that longshoremen who happen to be on the high seas continue to be covered by the LHWCA is surely related to the infrequency of longshoremen's happening upon the high seas.

[14] Reynolds' LHWCA coverage is exclusive. He may not sue Litton for negligence under § 905(b) as while the sea trials were being conducted, Litton was still engaged in shipbuilding. [15] The legislative history pertaining to § 905(b) explains that if the injured

employee was employed by the vessel to provide shipbuilding or repair services and his injury was caused by the negligence of other persons providing such services to the vessel, a negligence action against the vessel would be barred.

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

Richard Reynolds appeals from a decision granting summary judgment for the defendant. Because we find that Reynolds was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, and because we find that the Act provides Reynolds' exclusive remedy, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Richard Reynolds worked as a shipfitter for Litton Systems, Inc. ("Litton") at the Ingalls Shipyard in Pascagoula, Mississippi. A contract between Litton and the United States Navy called for Litton to construct a ship, the USS Ticonderoga, and the contract further required that Litton carry out certain sea trials prior to handing the ship over to the Navy. Litton took the ship to sea in May, 1982, to execute the required sea trials. Reynolds volunteered to sail on the ship, and he was assigned to the steward's department where his duties were to wash and stow the mess utensils.

Reynolds was washing pots and pans when the ship began to execute high speed turns. The maneuvers caused soapy water to spill out of the sink and onto the deck where Reynolds was standing. Reynolds slipped in the soapy water and injured his knee. Reynolds brought suit to recover for his knee injury, predicating his action on four grounds: negligence of Litton under the Jones Act, 46 U.S.C. § 688; negligence of Litton under the Longshoremen's and Harbor Workers' Compensation Act, (hereinafter "LHWCA" or the "Act"), 33 U.S.C. § 905(b);[1] unseaworthiness of the Ticonderoga; and gen-

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[1] 905(b) provides, in part, as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action

eral maritime negligence. Initially, a federal magistrate granted Litton's motion for partial summary judgment, dismissing all of Reynolds' claims except the § 905(b) action. Subsequently, the district court also granted Litton's motion for summary judgment on the § 905(b) action.

Reynolds applied for and has received compensation from Litton under the LHWCA. He brings this appeal, however, in an effort to recover additional compensation. Reynolds offers two alternative proposals. First, he contends that the district court erred in concluding that Reynolds was covered at all by the LHWCA. Reynolds' position is that there is a disputed question of fact as to whether Reynolds' injury occurred within the jurisdictional limits of the LHWCA: that is, whether his injury occurred while the Ticonderoga was on the "navigable waters of the United States." 33 U.S.C. § 903(a).[2] Reynolds contends that if the injury occurred while the ship was outside the three-mile territorial limit, then the LHWCA does not apply, meaning that Reynolds is not covered under the LHWCA and is free to sue Litton under a theory of general maritime negligence.

If the court should determine that the LHWCA does apply, however, then Reynolds' second argument becomes relevant. The compensation Reynolds has received under the LHWCA provides his exclusive remedy unless he falls within an exception delineated by § 905(b) of the Act. Section 905, entitled "Exclusiveness of Liability," provides that, under some circumstances, employees injured by a vessel's negligence may bring suit against the vessel.[3] In addi-

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against such vessel as a third party in accordance with the provisions of section 933 of this title .... If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

[2]Section 903(a), the Coverage provision, extends the Act to injuries which occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

[3]*See supra* note 1.

tion, the Act defines "vessel" as "any vessel . . . said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). Reynolds' argument proceeds on the basis of two fundamental assertions: that Reynolds, at the time he was injured, was not engaged in "shipbuilding" activity but was rather performing duties of a steward; and that Litton was an "operator" of the Ticonderoga and therefore amenable to suit under § 905(b) as the "vessel."

We conclude that Reynolds was a longshoreman covered by the LHWCA, that § 905(b) specifically bars Reynolds' action against Litton, and that Litton was not an "operator" of the Ticonderoga within the meaning of the statute. As a result, the compensation which Reynolds has received under the LHWCA is his exclusive remedy.

II. JONES ACT STATUS.

[1] Reynolds argues that the district court erred in granting summary judgment for the defendant on the matter of Reynolds' Jones Act seaman status. The question of seaman status under the Jones Act is generally a factual issue best suited for resolution by a jury. *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 280 (5th Cir. 1981), *appeal after remand*, 684 F.2d 335 (5th Cir. 1982). However, when the undisputed material facts establish beyond question as a matter of law the lack of seaman status, summary judgment is appropriate. In this case, the facts relevant to the determination of seaman status are undisputed, and those facts compel the conclusion that, as a matter of law, Reynolds was not a seaman.[4]

[2] Sitting en banc, this court recently reviewed the principles relevant to determining seaman status, originally distilled in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). *See Barrett v. Chevron, U.S.A., Inc.*, ___ F.2d ___ (5th Cir. 1986) (en banc). A worker is a seaman if (1) "the employee was assigned permanently to a vessel or performed a substantial part of his work on the

[4] *See Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981) (upholding granting of summary judgment "where the facts establish beyond question as a matter of law" that injured employee is not a Jones Act seaman).

vessel," and (2) "the employee contributed to the function of the vessel or to the accomplishment of its mission." *Barrett*, ___ F.2d at ___ (slip op. at 3256, 3257). We explained in *Barrett* that the second *Robison* prong is easily satisfied since various "Supreme Court cases require such a broad definition of 'aid to navigation.'" *Barrett* ___ F.2d at (slip op. at 3257). However, it is clear in the present case that Reynolds cannot satisfy the first prong of the *Robison* test since the Ticonderoga was not a "vessel in navigation." Without a vessel in navigation, however, there can be no Jones Act coverage.

[3] In *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971), this court held that a ship engaged in sea trials makes no warranty of seaworthiness; the ship is undergoing trials precisely to determine what, if any, additional work needs to be done. More important for our purposes here, a ship undergoing sea trials is not "in navigation" for purposes of the Jones Act. 452 F.2d at 958. Consequently, "[a] shipbuilder's worker [such as Reynolds] assisting in the building and ultimate commissioning of a launched but uncompleted vessel floating *or maneuvering* in navigable waters is not a seaman within the meaning of the Jones Act, because his vessel is not yet an instrumentality of commerce—private or public—and is therefore not 'in navigation.'" 452 F.2d at 958 (emphasis added); *see also Bouvier v. Krenz*, 702 F.2d 89, 91 n.3 (5th Cir. 1983) (adhering to *Williams* and explaining that "participati[on] in sea trials does not confer seaman status"). Reynolds simply was not a Jones Act seaman. He was a shipfitter covered under the LHWCA who volunteered to sail on the Ticonderoga during her brief sea trials.

III. APPLICABILITY OF THE LHWCA.

[4] Neither Reynolds nor Litton disputes that the LHWCA applies to shipfitters such as Reynolds. To hold that the Act ceased to apply merely because Reynolds was injured while the Ticonderoga was more than three miles offshore would be to impart an exceedingly parochial meaning to a statute which is to be construed liberally to protect injured maritime workers.

[5] Reynolds argues that since his injury occurred while the Ticonderoga was on the high seas, he falls outside the coverage of

the LHWCA.[5] The LHWCA extends only to the "navigable waters of the United States," and Reynolds asserts that the high seas are not navigable waters of the United States. We conclude, however, that navigable waters of the United States may include the high seas, and that both the legislative history of the LHWCA as well as the congressional objectives underlying the Act mandate that the Act apply to Reynolds.

A. *Navigable Waters of the United States.*

We begin with the language of the Act itself. "[C]ompensation shall be payable . . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). The Act does not define the phrase "navigable waters of the United States," but the phrase has been often construed in admiralty cases. *See, e.g., The Plymouth,* 70 U.S. (3 Wall.) 20, 33 (1865) (referring to "the high seas, or other navigable waters within admiralty cognizance"); *The Eagle,* 75 U.S. (8 Wall.) 15, 20-21 (1868) ("public navigable waters" include "lakes, and waters connecting them, . . . the high seas, bays, and rivers navigable from the sea"); *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871) (waters "constitute navigable waters of the United States within the meaning of acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries"); *The Montello,* 78 U.S. (11 Wall.) 411, 415 (1871) (water "can only be deemed a navigable water of the United States when it forms . . . a highway" "over which commerce is or may be carried on with other States or foreign countries"); *Ex parte Easton,* 95 U.S. 68, 72 (1877) ("Public navigable waters . . . of course include the high seas"); *Atlantic*

[5]The district court did not make a finding as to where the injury actually occurred. Reynolds acknowledges this point and asks for a remand with instructions to the district court to determine where the injury occurred. However, Litton concedes that at the time Reynolds slipped and fell the ship was beyond the three-mile territorial limit and was on the high seas. Thus, we are faced squarely with the question of whether the LHWCA can apply to Reynolds even though the Ticonderoga was executing maneuvers on the high seas at the time Reynolds sustained his injury.

Transport Co. v. Imbrovek, 234 U.S. 52, 59 (1914) (referring to "the high seas or other navigable waters").[6]

[6] The "high seas," as the term is currently understood, do begin at a line three miles offshore, but it has never been understood that the navigable waters of the United States end there. The "high seas" simply encompass "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." 1 *Benedict on Admiralty* § 141, at 9-2 (7th ed.). Benedict goes on to explain that "[m]uch of the maritime legislation enacted since 1910 [including the LHWCA] applies to all the navigable waters of the United States without distinction—to the high seas, the coastal waters and sounds and bays, the Great Lakes, the inland rivers and lakes." *Id.* at 9-46 & n.8.

[7] Language in the LHWCA lends further support to the conclusion that the Act's use of the term "navigable waters" includes the high seas. For example, although the "Coverage" section of the Act does not use the phrase "high seas," the "Administrative" section does, referring to compensation districts which will "include the high seas." *See Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F. Supp. 101, 107-09 (S.D.N.Y. 1981) (*Cove Tankers I*), *aff'd*, 683 F.2d 38 (2d Cir. 1982). In addition, the original "Application" provision of the Act provided that "[t]his act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States, except employment of a local concern and of no direct relation to navigation and commerce: but shall not apply to employment as master or crew of a vessel." S. 3170, 69th Cong., *quoted in* 1A *Benedict on Admiralty* § 7, at 1-11 (7th ed.). The admiralty jurisdiction of the United States clearly includes the high seas. The original provision was deemed too confusing, however, so it was rewritten to provide that compensation would be payable "but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including

[6] We are not unaware of, but simply unpersuaded by, the argument that navigable waters *do* end at the high seas and that the high seas are therefore beyond the reach of the LHWCA. *See, e.g.*, Millus & Manes *Longshoremen's & Harbor Workers' Compensation Act and its Extensions*, 77-80 (1978) (quoted in *Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F. Supp. 101, 107-08 n.9 (S.D.N.Y. 1981) (*Cove Tankers I*), *aff'd*, 683 F.2d 38 (2d Cir. 1982)). *But cf.* 1 *Benedict on Admiralty* 9-46-47 (7th Ed. 1974 & Supp. 1980).

any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Section 903 of the 1927 Act, *quoted in id.* at 1-11.

[8] Finally, the "Definitions" section of the Act defines "United States" as "the several States and Territories and the District of Columbia, *including the territorial waters thereof.*" 33 U.S.C. § 902(9) (emphasis added). If "navigable waters" were to exclude the high seas and encompass only territorial waters, then the phrase "navigable waters of the United States" in § 903 would be unnecessary and redundant since the term United States includes, by definition, the nation's territorial waters. The fact that the Act specifies navigable waters in the section pertaining to coverage (§ 903) while using territorial waters to define the United States (§ 902(9)) suggests a distinction between the two. The language of the Act itself, therefore, supports the conclusion that the LHWCA does not cease to operate at the three-mile line.

B. *Legislative History.*

Judicial consideration of the reach of the LHWCA has focused predominantly on how far the Act extends inward.[7] *See, e.g., P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979); *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977); *Boudreaux v. American Workover, Inc.,* 680 F.2d 1034 (5th Cir. 1982) (en banc), *cert. denied,* 459 U.S. 1170 (1983); *Texports Stevedore Co. v. Winchester,* 632 F.2d 504 (5th Cir. 1980) (en banc), *cert. denied,* 452 U.S. 902 (1981); *Newport News Shipbuilding & Dry Dock v. Graham,* 573 F.2d 167 (4th Cir.), *cert. denied,* 439 U.S. 979 (1978); *Alabama Dry*

[7]We have located only two reported federal court opinions discussing the applicability of the LHWCA to the high seas. *Cove Tankers Corp. v. United Ship Repair, Inc.,* 528 F. Supp. 101 (S.D.N.Y. 1981) (*Cove Tankers I*), *aff'd,* 683 F.2d 38 (2d Cir. 1982). In *Williams v. Avondale Shipyards, Inc.,* 452 F.2d 955 (5th Cir. 1971), we expressly did not decide whether the term "navigable waters of the United States" extends to the high seas or is limited to territorial waters. 452 F.2d at 959-61. *See also Szumski v. Dale Boat Yards, Inc.,* 216 A.2d 256 (N.J. Super. 1966) (stating LHWCA covers injury sustained on the high seas), *rev'd on other grounds,* 226 A.2d 11 (N.J.), *cert. denied,* 387 U.S. 944 (1967). *Cove Tankers I,* an extremely thorough analysis of the legislative history of the LHWCA, concluded that, in the context of the Act, "navigable waters of the United States" includes the high seas.

Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977); *Dravo Corp. v. Maxin,* 545 F.2d 374 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). Accordingly, the various analyses of the original legislative history and the history pertaining to the 1972 amendments of the LHWCA have searched especially for indications of the Act's landward reach. This case involves the Act's seaward extent. In this regard, it merits emphasis that the context we confront is highly unusual, involving, as it does, a shipfitter, ordinarily accustomed to working on or near shore, who happens to have been several nautical miles out to sea. Given the peculiarity of this circumstance, it is not surprising that the legislative history touching on this issue is scarce. It is not, however, non-existent.

[9] The original version of the "Administrative" provisions of the Act did not specify that the compensation districts would include the high seas. However, as Judge Sand explained in *Cove Tankers I,* the Senate modified the bill to read as it currently does, explicitly including the high seas. *See Cove Tankers I,* 528 F. Supp. at 110. Judge Sand acknowledged, and our review of the history has confirmed, that the legislative history is not fully illuminating. However, although the legislative history does not expressly define "navigable waters of the United States," the legislative hearings pertaining to the Act, and to the 1972 and 1984 amendments to the Act, refer periodically to "navigable waters" without suggesting that the phrase is confined to territorial waters. For example, in explaining the 1984 amendments to section 3 of the Act, the House Report explains that the Act covers employees who work "over the water." House Report No. 98-570, Part I, Committee on Education and Labor, *reprinted in* 1984 U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess., at 2738-39 (hereinafter 1984 U.S. Code Cong. & Ad. News). Similarly, in the section-by-section analysis of the Act, the Report refers to compensating employees whose "injuries occur[] on the navigable waters." *Id.* at 2759.

The 1972 amendments to the Act extended coverage to shoreside areas. Congress did not directly address the Act's seaward reach, but the history cannot fairly be read to support the view that the Act stops at the three-mile line. Indeed, in explaining the 1972 amendments, the House Report noted only that "coverage of the present [i.e., pre-1972] Act stops at the water's edge. . . . The result

is a disparity in benefits payable . . . for the same type of injury depending on which side of the water's edge . . . the accident occurs." House Report No. 92-1441, Committee on Education and Labor, *reprinted in,* 1972 U.S. Code Cong. & Ad. News, 92nd Cong., 2d Sess., at 4707 (hereinafter 1972 U.S. Code Cong. & Ad. News). A primary purpose of the 1972 amendments was to eradicate the inequity of a scheme where longshoremen could walk in and out of coverage (*see infra* III C).

[10] As the early Supreme Court cases make clear, the phrase "navigable waters of the United States" often includes the high seas. Had Congress intended to define navigable waters more narrowly for purposes of the LHWCA, it could have chosen the term territorial waters, *see, e.g.,* 1 *Benedict on Admiralty* § 141 (7th ed.), or it could have explicitly indicated that navigable waters of the United States exclude the high seas. There is no indication of such a limitation in the legislative history. On the contrary, Congress passed the LHWCA under the constitutional grant of admiralty jurisdiction. *Crowell v. Benson,* 285 U.S. 22 (1932); *see also* Gilmore & Black, *The Law of Admiralty* §§ 6-47, 6-48, 6-49 (2d ed. 1975). In the context of admiralty jurisdiction, the phrase "navigable waters of the United States" has been used in contradistinction to navigable *State* waters, not in contrast to the high seas. *See, e.g., The Montello,* 78 U.S. at 415; *The Daniel Ball,* 77 U.S. at 563; *see also* 1 *Benedict on Admiralty* § 141, at 9-2, 9-37 (7th ed.). Furthermore, Congress attempted with the passage of the original LHWCA to preserve the applicability of state law workers' compensation remedies. *See* Gilmore & Black, *The Law of Admiralty* §§ 6-46, 6-49. This effort failed, but the effort itself buttresses the conclusion that the phrase "navigable waters of the United States" in the LHWCA embodies the same distinction which it does in admiralty generally: the distinction between State waters and waters of the United States, not between territorial waters and the high seas.

[11] On review of *Cove Tankers I,* the Second Circuit, in an opinion by Chief Judge Feinberg, affirmed the judgment, holding that, regardless of whether "navigable waters of the United States" *always* include the high seas within the meaning of the LHWCA, the Act *can* consistently be applied to longshoremen injured on the high seas. *Cove Tankers Corp. v. United Ship Repair, Inc.,* 683 F.2d

38, 41 (2d Cir. 1982) (*Cove Tankers II*). Focusing on the facts of the case before it, involving an employee performing ship repair duties aboard a vessel bound for New York from Philadelphia, the Second Circuit observed that declining to apply the Act to an injury occurring 135 miles offshore "would be inconsistent with congressional intent to reduce the importance of situs as applied to employees who might otherwise be covered for only a part of their work." 683 F.2d at 42. The argument offered to this court by Reynolds seems similar to that which was urged before the Second Circuit in *Cove Tankers II*. We therefore quote the core of that court's cogent response:

> Were we to follow the reasoning urged upon us by [Reynolds], that the Act can never apply to waters farther than three miles offshore, the voyage in this case would have moved the employees in and out of coverage. Indeed, under that reasoning, shipowners could by mere course deviation into waters beyond that limit, prevent employees, should they be injured, from receiving the Act's benefits.... It is true that congressional focus in 1972 was landward, not seaward. But, paraphrasing the Supreme Court, we do not think that Congress intended the Act's coverage to shift with the shipowner's whim. [*Pfeiffer v. Ford*, 444 U.S. 69, 83 (1979).]

683 F.2d at 42.[8]

[8]A factual distinction between Reynolds and the longshoreman in *Cove Tankers* merits mention. Reynolds was not, while aboard the Ticonderoga, performing his usual duties. However, he was still employed as a shipfitter for Litton, and Litton took the Ticonderoga out on sea trials pursuant to its construction contract. Reynolds' status as a worker who is covered under the Act has never been an issue in this case. And though he was not doing his usual job at the time he was injured, other courts have noted that a worker does not cease to be covered by the Act merely because at the moment of injury he is not performing his usual duties. *See, e.g., Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978); *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264, 274 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). This conclusion is firmly supported by the 1984 amendments' legislative history, which states:

> The Committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending on

C. *Policy Considerations.*

[12] The Second Circuit's opinion in *Cove Tankers II* repeats a persistent theme of judicial opinions construing the post-1972 version of the LHWCA, namely: that Congress' general intent in enacting the 1972 amendments was to *broaden* the Act's coverage, to insure that workers not cease to be covered by the mere fortuity of crossing a line. *See, e.g., Director OWCP v. Perini North River Associates,* 459 U.S. 297 (1983). Given the diminution in significance of the line between land and sea from the standpoint of LHWCA coverage, it would be odd indeed to conclude that the line between territorial waters and the high seas marks the outer boundary of the LHWCA. Neither the language of the Act nor the considerations underlying the Act lend support to the notion that the three-mile line is the on-off switch for the LHWCA.

In *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 349 (1977), Justice Marshall observed for a unanimous Court that in enacting the 1972 amendments, Congress aimed at creating a system which does "not depend on the 'fortuitous circumstance of whether the injury . . . occurred on land or over water.' " 432 U.S. at 272 (quoting report of Senate Committee on Labor and Public Welfare, No. 92-1125, at 13 [hereinafter S. Rep. (1972)]; Report of the House Committee on Education and Labor, No. 92-1441, at 10 [hereinafter H. Rep. (1972)]). In addition, "[t]he language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." *Caputo,* 432 U.S. at 268.

[13] The failure of the Act to state explicitly that longshoremen who happen to be on the high seas continue to be covered by the Act is surely related to the infrequency of longshoremens' happening upon the high seas. In fact, the legislative history accompanying

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the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.

1984 U.S. Code Cong. & Ad. News, at 2736-37.

formative congressional efforts to permit states to extend their workmens' compensation schemes beyond their shores confirms this conclusion:

> The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into different jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as other local workmen.

H. Rep. No. 639, 67th Cong., 2d Sess., at 2 (1922) (quoted in *Caputo,* 432 U.S. at 257 n.12). As Reynolds has demonstrated, longshoremen may on occasion have their jobs carry them to sea. That this happens rarely does not mean that when it does, longshoremen lose their protection.

In *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979), Justice Powell pointed out for a unanimous Court that the legislative history pertaining to the 1972 amendments "discusses workers solely in terms of what they are doing and never in terms of where they are working." 444 U.S. at 80; *see also* 444 U.S. at 78 n.8, 83. Nevertheless, the Court has repeatedly recognized that the Act must be interpreted liberally, to effectuate Congress' intention that longshoremen who meet the status requirement for coverage continue to be covered regardless of their precise location at the moment of injury. *See, e.g., Perini,* 459 U.S. at 315-16.

In *Texports Stevedore Co. v. Winchester,* 632 F.2d 504 (5th Cir. 1980) (en banc), *cert. denied,* 452 U.S. 905 (1981), this court noted that neither the *Caputo* nor the *Pfeiffer* opinions "tangle[d] with the thornier problems of the new 'situs test' " contained in the post-1972 Act. 632 F.2d at 510. We then observed, although the case at hand involved landward extension of the Act, that the Act's situs requirement is not amenable to definition by the use of fixed lines. "All circumstances must be examined." 632 F.2d at 514. Obviously, "[t]he site must have some nexus with the waterfront," but reliance on "hard lines . . . would frustrate the congressional objectives of providing uniform benefits." 632 F.2d at 514-15. We also explained in *Winchester* that under binding Supreme Court and Fifth Circuit authority, "[t]he Act should be liberally construed in favor of injured workers, 'in conformance with its purpose, and in

a way that avoids harsh and incongruous results.' " 632 F.2d at 515 (quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953)). We continued: "A broad interpretation of the maritime situs requirement reduces the number of workers walking in and out of coverage and promotes uniformity." 632 F.2d at 516. To hold in this case that the three-mile line constitutes the outer boundary of the LHWCA would be to introduce hard lines and to create a statute which builders testing their ships could easily and purposefully sail beyond.

IV. EXCLUSIVITY OF LHWCA.

[14] Reynolds maintains that even if he is covered under the LHWCA, he may sue Litton for negligence under § 905(b). Reynolds relies upon the first sentence of the statute which provides as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel. . . .

33 U.S.C. § 905(b). In addition to the sentence which forms the basis of Reynolds' claim, however, the statute also contains an additional sentence which is largely overlooked by both sides in this appeal. That sentence provided:[9]

> If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons

[9]In 1984, § 905(b) was amended, and the sentence quoted in the text now reads as follows:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

33 U.S.C. § 905(b). This provision, as amended, applies only to injuries sustained after September 28, 1984; Reynolds was injured well before that date.

> engaged in providing shipbuilding or repair services to the vessel.

33 U.S.C. § 905(b) (1972). We conclude that while the Ticonderoga was at sea for sea trials, Litton was still engaged in shipbuilding; consequently, Reynolds may not sue under § 905(b).

At the time Reynolds was injured, Litton was performing ship building services. Our opinion in *Williams* makes clear that a shipbuilder takes a ship out for sea trials to determine whether the ship is "completed, fit and seaworthy." 452 F.23d at 957. "The whole purpose of the sea trial was to ascertain what additional work would be required to make the [Ticonderoga] fully fit." 452 F.2d at 957. Although some two-thirds of the approximately 500 persons aboard the Ticonderoga were Litton employees (with the remainder being Navy personnel), Litton was not operating the ship in commerce; it could not use the ship for its own benefit. Litton was testing the Ticonderoga as required by its construction contract with the Navy.

[15] The definition of vessel was added to the LHWCA by the 1972 amendments. The legislative history accompanying the amendment of that section is brief, but the 1972 legislative history pertaining to § 905(b) does explain that "if the [injured] employee were employed by the vessel to provide shipbuilding or repair services and his injury were caused by the negligence of other persons providing such services to the vessel, such a[] [negligence] action against the vessel would be barred." 1972 U.S. Code. Cong. & Ad. News, at 4719. It is therefore clear that even before the 1984 amendments, the type of action Reynolds is seeking to bring against Litton was barred by the 1972 version of the Act. Further, the pertinent legislative history prior to the 1984 amendments explains that "the [1972] bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel." 1972 U.S. Code Cong. & Ad. News, at 4705.

Reynolds' employer, Litton, was engaged in shipbuilding services. Litton's duties as "operator" were highly circumscribed, spe-

cifically defined, and merely incidental to its contractual obligation to build a ship. *Cf. Ducote v. International Operating Co.*, 678 F.2d 543, 546 (5th Cir. 1982) (party cleaning and loading a barge not an owner pro hac vice because it "did not have the right to use the barge for its own purposes in maritime commerce").[10] Reynolds, moreover, worked for Litton as a shipfitter. His brief voyage on the Ticonderoga was a volunteer sojourn which occurred while Litton was still in the process of building the ship. Reynolds is clearly barred from bringing an action under § 905(b).

V. CONCLUSION.

In summary, we hold that (1) Reynolds was not a Jones Act seaman; (2) he continued to be covered by the LHWCA even though he sustained his injury while the Ticonderoga was beyond territorial waters; and (3) he may not sue under § 905(b) because Litton was engaged in shipbuilding activity. Accordingly, the judgment of the district court is AFFIRMED.

[10]This analysis is consistent with the Supreme Court's reasoning in *Reed v. The Yaka*, 373 U.S. 410 (1963), where the Court explained that a bare boat charterer or owner pro hac vice is treated as a vessel owner under the statute because the charterer or owner pro hac vice has "full possession and control of the vessel"; the ship "makes his voyages and carries the cargo he chooses"; and he receives the primary benefit of "[s]ervices performed onboard the ship." 373 U.S. at 412.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-4193

RICHARD A. REYNOLDS,

Plaintiff-Appellant,

versus

INGALLS SHIPBUILDING DIVISION,
LITTON SYSTEMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion April 25, 5 Cir. 1986, ____ F.2d ____)

(May 27, 1986)

Before GOLDBERG, RANDALL and JOHNSON, Circuit Judges.

PER CURIAM:

(/) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for

panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/RANDALL
United States Circuit Judge